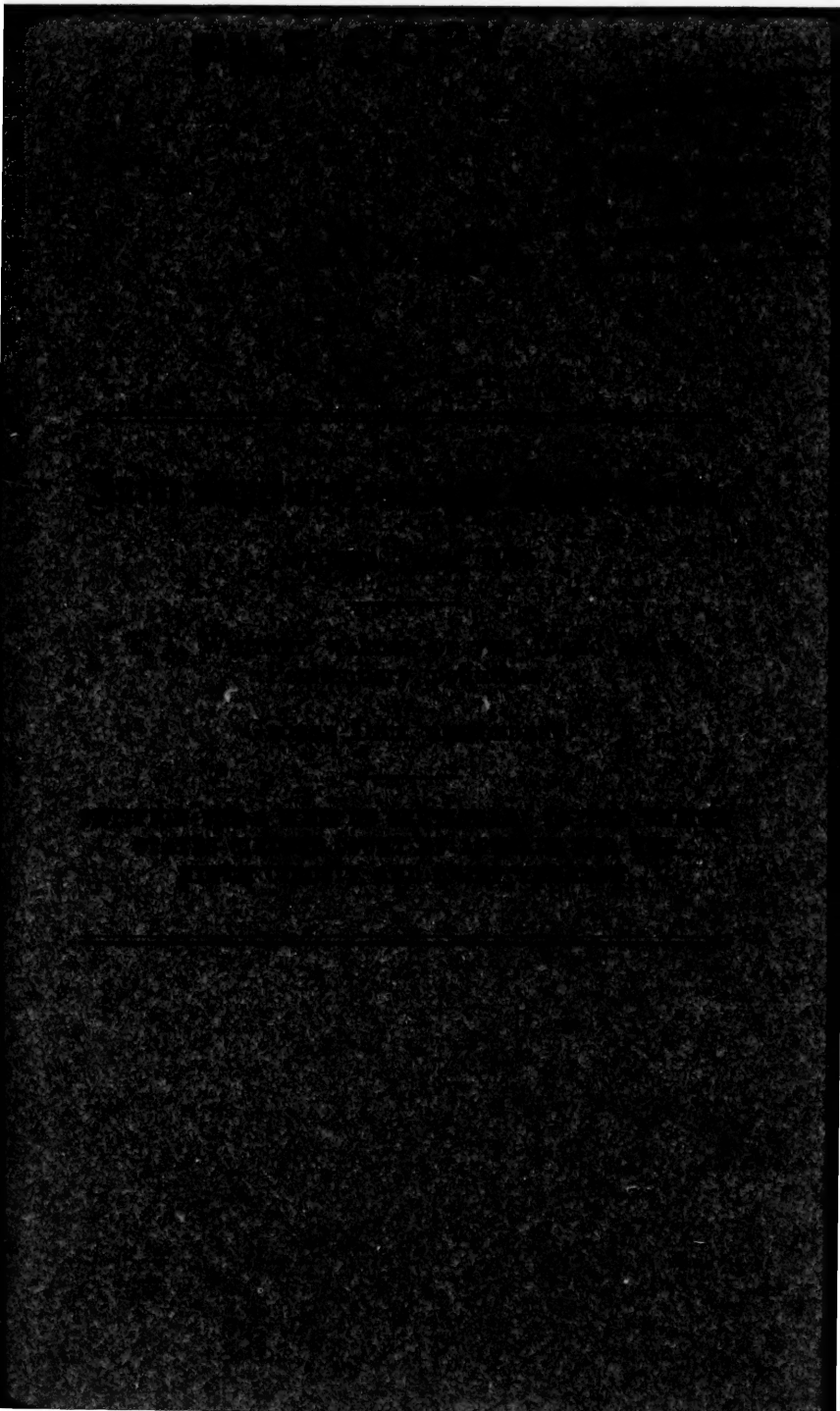

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

E. L. WHITNEY, WARDEN OF THE IDAHO State Penitentiary, petitioner,
*vs.*
GEORGE DICK, RESPONDENT.

No. ——.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

May 1, 1893, commissioners appointed by the President pursuant to the act of February 8, 1887 (24 Stat. 388), for the allotment of lands in severalty to the Indians, made an Agreement with the Nez Perce tribe in Idaho for the cession to the United States of all the unallotted lands within the limits of their reservation, saving and excepting certain described tracts. This Agreement was ratified by Congress August 15, 1894 (28 Stat. 326, 331).

Article IX of the Agreement provided:

> It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all

> the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

The validity of this Article, so far at least as it relates to the lands ceded, is drawn in question in this case.

The facts are these:

George Dick, a Umatilla Indian, was indicted at the May term 1905 of the United States District Court for the District of Idaho for introducing liquor into the Indian country, to wit, into and upon the Nez Perce Indian reservation in the county of Nez Perce. (R. 21.)

A demurrer to the indictment was overruled. The grounds of the demurrer were that there was no Indian country in the county of Nez Perce and within the jurisdiction of the court; that the words "Nez Perce Indian reservation" were indefinite and uncertain; and that no offense against the laws of the United States or within the jurisdiction of the District Court was charged. (R. 22.)

At the trial, evidence was introduced to the effect that the alleged offense was committed at the village of Cul de Sac, which is located upon the land ceded by the Nez Perces to the United States. Prior to the alleged offense, this land had passed under the townsite laws to the probate judge of Nez Perce County in trust for the inhabitants of the village.

Dick having been convicted and imprisoned in the State penitentiary in pursuance of the sentence imposed, applied to the Circuit Court of Appeals for the Ninth Circuit for a writ of *habeas corpus* directed to

the warden of the penitentiary, and also for a writ of *certiorari* to the District Court to bring up the record and proceedings in the case. (R. 1–6.)

The Circuit Court of Appeals issued a writ of *certiorari* as prayed, and upon a consideration of the case held the District Court had no jurisdiction of the offense charged, and directed the discharge of the prisoner. (R. 42–43.)

From that judgment an appeal was allowed to this court. (*Whitney* v. *Dick*, No. 494 of this term.) The record in that case, which has been printed, is referred to in this petition.

This application for *certiorari* is made because it is thought an appeal will not lie, there being no pecuniary amount involved. (*Lau Ow Bew* v. *United States*, 144 U. S. 47, 58.)

The question presented is of great importance. Both the Federal and State governments await definite advice as to their jurisdiction over the lands in question and over others similarly situated. The decision of this court in the Heff case (197 U. S. 488) is not controlling. The question there was as to the authority of Congress, *after* an Indian allottee had been made a citizen and put under the jurisdiction of the State, to exercise certain police jurisdiction over him. Here the question is as to the authority of Congress *before* that took place—if it has ever taken place—to reserve a limited jurisdiction over the ceded territory. In this case, the matter of citizenship and subjection to State authority, and not the jurisdiction retained by Congress, is really in issue.

At the time the Agreement in question was made, May 1, 1893, as well as at the time it was ratified by Congress, August 15, 1894, none of the Nez Perces had received allotments in severalty. A schedule of allotments had been completed and submitted to the Land Office on May 15, 1893. This schedule, with certain exceptions, was recommended for approval by the Commissioner of Indian Affairs on March 18, 1895, and on the following day, March 19, 1895, was approved by the Secretary of the Interior, and patents for said allotments directed to issue.

There can be no dispute about these facts, as they are matters of public record. For the convenience of the court, I have attached a certified copy of the records of the Land Office in which they are set forth (Exhibit A). The Reports of the Commissioner of Indian Affairs also show that no allotments to the Nez Perces were approved or patents issued prior to 1895. (Rep. Com. Indian Affairs, 1893, p. 23; Id. 1894, p. 20; Id. 1895, p. 19.) It is true the Agreement purports to cede the "unallotted" lands in the reservation. But the parties had in mind allotments to be made or in process of making, not any which had been made.

As, under the act of February 8, 1887, sec. 6, citizenship and subjection to the jurisdiction of the State does not attach until "the completion of said allotments and the patenting of the lands to said allottee," it follows that at the time the Agreement was made and ratified the Nez Perces were still wards of the nation and the power of Congress to regulate commerce with

them had been in no wise impaired. If the stipulations in the Agreement are inconsistent with the citizenship and subjection to State jurisdiction provided by the Act of 1887, it would seem that the provisions of the act must yield to those of the Agreement, since the Agreement is the later and more specific expression of the legislative will on the subject.

A further ground for bringing up this case is that the Circuit Court of Appeals apparently was without jurisdiction to issue the writ of *habeas corpus*. The authority of the Federal courts to issue writs of *habeas corpus* is purely statutory, and no such authority has been conferred upon the Circuit Courts of Appeals. They are authorized to review final decisions in the Circuit and District Courts only by writ of error or appeal, and to issue only such writs as may be necessary for the exercise of the appellate jurisdiction conferred upon them. In the latter grant, as shown in the brief hereon, the writ of *habeas corpus* is not included.

In any event it would seem that the writ was improvidently issued. Judgment was imposed May 18, 1905, and stay of execution for sixty days ordered upon defendant's giving $400 cash security for his appearance (R. 18), in default of which he was committed. (R. 11). The petition for the writ of *habeas corpus* and *certiorari* was filed August 29, 1905. (R. 1). At the time of the application, therefore, petitioner's right of appeal, either to this court or to the

Circuit Court of Appeals, had not expired. Instead of taking an appeal—although it appears that a bill of exceptions was prepared for that purpose (R. 21–33)—he sued out a writ of *habeas corpus*.

For the reasons stated, it is prayed that a writ of *certiorari*, either in pursuance of section 6 of the act of March 3, 1891 (26 Stat., 826), or section 716 of the Revised Statutes, may issue to the Circuit Court of Appeals to bring up the case for such action as the circumstances may require. Process is prayed under both statutes because, as this case involves the constitutionality of a law of the United States, it does not belong to the class of cases "made final" in the Circuit Court of Appeals by the act of March 3, 1891, and therefore it is doubtful whether *certiorari* could issue under that act. (But see *Lau Ow Bew* v. *United States*, 144 U. S., 58.) This court has declared its authority, under section 716, R. S., to issue a writ of *certiorari* "in all proper cases" (*In re Tampa Suburban Railroad Company*, 168 U. S., 587), and, if the circumstances imperatively require it, "to correct excesses of jurisdiction and in furtherance of justice." (*In re Chetwood*, 165 U. S., 443, 462.) See also *In re Vidal*, 179 U. S., 126.

The jurisdictional question is not suggested for the purpose of delay, but because it is necessarily presented by the circumstances of the case, and I feel that I should be derelict in my duty to the court if I did not advert to it. But as both the

United States and the State are concerned in the speedy decision of the question of governmental control presented on the merits, I beg to suggest, with the concurrence of counsel for respondent, that if the court should be of the opinion that the Circuit Court of Appeals was without jurisdiction to issue the writ of *habeas corpus*, and must, perforce, upon *certiorari*, dispose of the case on that ground, the court will, if it issue the writ, advance the case and take it as submitted upon the briefs filed with this application, in order that the respondent may, when the case is disposed of, bring the proceedings in the District Court here by writ of error or otherwise for review without unnecessary delay. Those proceedings having been vacated by the judgment of the Circuit Court of Appeals, a writ of error will not lie, it is believed, until the judgment of that court is set aside.

HENRY M. HOYT,
*Solicitor General.*

---

EXHIBIT A.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
*Washington, December 30, 1905.*

I, C. F. Larrabee, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true and literal copy of the certificates attached to the original schedule of allotments made to the Nez Perce Indians in the State of Idaho as the same appear of record in this Office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this Office to be affixed, [SEAL] on the day and year first above written.

C. F. LARRABEE,
*Acting Commissioner.*

We hereby certify that the foregoing schedule of Allotments (123 sheets) made by us to the Indians residing on the Nez Perce Reservation Idaho is correct; that each of the persons therein named is entitled to the lands allotted to him or her. And that the same were selected in accordance with the provisions of the Act of Congress Approved February 8, 1887, and amended and approved February 28, 1891, and the instructions of the Acting Commissioner of Indian Affairs approved by the Secretary of the Interior.

ALICE C. FLETCHER,
*U. S. Special Agent.*
WARREN I. ROBBINS,
*U. S. Indian Agent.*

MAY 15 1893.

---

DEPARTMENT OF THE INTERIOR.
OFFICE OF INDIAN AFFAIRS,
*March 18, 1895.*

The foregoing schedule (embracing 123 sheets) of allotments of lands in severalty made to the Indians on the Lapwai or Nez Perce Reservation in Idaho under the Act of Congress Approved February 8, 1887, (24 Stats.,) 388, as amended by the Act of February 28, 1891, (26 Stats., 794) by Special Agent Alice C. Fletcher and U. S. Indian Agent W. D. Robbins, under authority of the President dated April 13, 1889, And instructions from the Office approved by the Department, is respectfully submitted to the Secretary of the Interior, with the recommendation that he approve the Allotments therein described (Except those numbered 194, 291, 387, 416, 459, 573, 574, 575, 678, 684, 685, 686, 695, 696, 697, 703, 742, 743, 744, 745, 746, 764, 765, 796, 806, 814, 815, 816, 821, 877, 878, 879, 880, 881, 882, 901, 916, 917, 918, 919, 924, 931, 932, 933, 946, 948, 949, 968, 969, 970, 997, 999, 1000, 1001, 1002, 1003, 1019, 1023, 1024, 1025, 1026, 1027, 1032, 1033, 1034, 1050, 1051, 1056, 1057, 1058, 1059, 1075, 1147, 1157, 1158, 1192, 1199, 1200, 1208, 1209, 1217, 1272, 1326, 1427, 1478, 1479, 1628, and 1629 which are suspended) and cause patents to issue therefor in the names of the Allottees as provided in the 5th Section of said Act of February 8, 1887.

D. M. BROWNING,
*Commissioner.*

DEPARTMENT OF THE INTERIOR,
*March 19th, 1895.*

The Allotments to the Nez Perce Indians in Idaho, as described in the above recommendation of the Commissioner of Indian Affairs, are hereby approved (Except those numbered 194, 291, 387, 416, 459, 573, 574, 575, 678, 684, 685, 686, 695, 696, 697, 703, 742, 743, 744, 745, 746, 764, 765, 796, 806, 814, 815, 816, 821, 877, 878, 879, 880, 881, 882, 901, 916, 917, 918, 919, 924, 931, 932, 933, 946, 948, 949, 968, 969, 970, 997, 999, 1000, 1001, 1002, 1003, 1019, 1023, 1024, 1025, 1026, 1027, 1032, 1033, 1034, 1050, 1051, 1056, 1057, 1058, 1059, 1075, 1147, 1157, 1158, 1192, 1199, 1200, 1208, 1209, 1217, 1272, 1326, 1427, 1478, 1479, 1628, and 1629 which are suspended) And the Commissioner of the General Land Office is directed to cause patents to issue therefor (except the numbers suspended) in form and of the legal effect prescribed by the 5th section of the Act of February 8, 1887.

HOKE SMITH, *Secretary.*

15247—06——2

## BRIEF IN SUPPORT OF PETITION.

### I.

**As to the Authority of the Circuit Court of Appeals to issue the Writ of Habeas Corpus.**

The Constitution provides (Art. I, sec. 9):

> The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

The constitutional provision is not, however, a grant of power to the courts to issue the writ, but a limitation upon its suspension by Congress or the Executive. The jurisdiction of the Federal courts to issue writs of *habeas corpus* (except so far as the original jurisdiction of this court is concerned) is purely statutory.

> *Ex parte Bollmann*, 4 Cranch, 93–94.
> *Ex parte Dorr*, 3 How. 104–105.
> *Ex parte Parks*, 93 U. S. 22.
> *Ex parte Hung Hang*, 108 U. S. 552.
> *In re Burrus*, 136 U. S. 586, 589 et seq.
> *Ex parte Caldwell*, 138 Fed. Rep. 487.
> 2 *Story on Const.*, sec. 1341.
> *Cooley's Const. Lim.*, *345–*349.

The several statutes on the subject have been embodied in Chapter Thirteen of the Revised Statutes, which provides:

> Sec. 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*.

Sec. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.

In these sections there is, of course, no mention of the Circuit Courts of Appeals.

The Circuit Court of Appeals Act (26 Stat. 826) provides:

Sec. 2. That there is hereby created in each circuit a Circuit Court of Appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with *appellate jurisdiction, as is hereafter limited and established.* Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure *as may be conformable to the exercise of its jurisdiction as shall be conferred by law.* * * *

* * * * *

Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, *and the review, by appeal, by writ of error, or otherwise,* from the existing circuit courts shall be had only in the Supreme Court of the United States or in the Circuit

Courts of Appeals hereby established *according to the provisions of this act regulating the same.*

* * * * *

Sec. 6. That the Circuit Courts of Appeals established by this act shall exercise *appellate jurisdiction* to review *by appeal or by writ of error* final decision in the district court and the existing circuit courts in all cases, etc.

* * * * *

Sec. 12. That the Circuit Court of Appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

Section 716 R. S. provides:

Sec. 716. The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias.* They shall also have power to issue all writs not specifically provided for by statute, *which may be necessary for the exercise of their respective jurisdictions,* and agreeable to the usages and principles of law.

That section 716 R. S. does not confer power to issue writs of *habeas corpus* is clear when its origin is considered. It was taken from section 14 of the Judiciary Act of 1789, which provided (1 Stat. 81):

That all the before mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well

> as the judges of the district courts shall have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of commitment. *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless when they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

The provisions of this statute, so far as they relate to writs of *habeas corpus*, were incorporated into sections 751, 752 and 753 of the Revised Statutes, while those relating to *scire facias* and the other writs referred to were incorporated into section 716. Section 716 cannot therefore be construed to authorize the issuance of a writ of *habeas corpus*.

The action of Congress in making section 716 alone applicable to the Circuit Courts of Appeals would seem to settle the matter, as there is nothing in the language of the Circuit Court of Appeals act which, in the face of that action, would warrant the implication of the right to issue writs of *habeas corpus*. The language of the act is most restrictive. Aside from section 716 R. S. (made applicable by sec. 12), their authority to review final decisions of the District and Circuit Courts is limited to writ of error and appeal.

The fact that no appeal would lie to this court from the action of Circuit Courts of Appeals in issuing a writ of *habeas corpus*, even in a case involving a constitutional question, further supports the view that they were not intended to exercise such jurisdiction.

In Foster's Federal Practice, vol. 2, p. 736, sec. 366, it is said that the jurisdiction of Circuit Courts of Appeals to issue the writ of *habeas corpus* is unsettled. In *In re Boles*, 48 Fed. Rep. 75, the Circuit Court of Appeals for the Eighth Circuit (Caldwell, Hallett and Thayer sitting) held that it had no jurisdiction to issue the writ for service outside its circuit, although its jurisdiction was invoked to review the decision of a territorial court within the circuit. In that case the contention was made that the court was without authority to issue the writ even where the petitioner was unlawfully restrained of his liberty within the circuit, but the court thought it best not to express any opinion on this important question. In *In re Nevitt*, 117 Fed. Rep. 448, the same court, but composed of different judges (Sanborn and Lochren), apparently assumed—the point was not raised—that it had authority to issue the writ in a proper case, though it refused to do so in that one.

In what has been said it has been assumed that this case is within the appellate jurisdiction of the Circuit Court of Appeals. If it is not, there is no ground whatever for issuing the writ, since it possesses no original jurisdiction. Whether it is within its appellate jurisdiction is not clear.

There are but two substantial questions in the case: 1. Whether the defendant did in fact introduce liquor into the place specified in the indictment. 2. Whether that place was Indian country. The first is an issue of fact, which was found by the jury and consequently

is not reviewable by any court. The second is a question of law dependent upon the validity of the Agreement with the Indians—a constitutional question properly reviewable under the Court of Appeals act by this court. If the incidental questions involved—the sufficiency of the venue laid in the indictment and the correctness of the court's rulings and instructions at the trial—warrant an appeal to the Circuit Court of Appeals, the decision of that court would apparently be final, as no pecuniary matter is involved, despite the fact that the substantial question presented is a constitutional one.

In any event, it would seem that the writ of *habeas corpus* was improvidently issued, as the time in which a writ of error might have been sued out, either to this court or to the Circuit Court of Appeals, had not expired. (*Riggins* v. *United States*, decided December 11, 1905.) In that case the court quoted the following with approval from the Chapman case, 156 U. S. 211:

> We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired until the conclusion of the proceedings. *If judgment goes against petitioner and is affirmed by the Court of Appeals and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have.* If, on the other hand, a writ of error does not lie to this court, and the Supreme Court of the District was absolutely without jurisdiction, the petitioner may *then* seek his remedy

through application for a writ of *habeas corpus*. We discover no exceptional circumstances which demand our interposition in advance of adjudication by the *courts* of the District upon the merits of the case before them.

## II. On the Merits.

**It was competent for Congress to stipulate that the lands ceded by the Nez Perces should be subject for a definite period to the laws of the United States regulating the introduction of liquor into the Indian country.**

At the time the agreement of May 1, 1893, was made and ratified, the Nez Perce Indian Reservation, being lands to which the Indian title had not been extinguished, was clearly Indian country within the meaning of the laws of the United States. By Article IX of the agreement it is declared that it shall continue to be Indian country for a period of twenty-five years. The authority of Congress so to provide is settled by the decisions of this court.

In *Bates* v. *Clark*, 95 U. S. 204, the court, referring to the lands described as Indian country in the act of June 30, 1834, said (p. 208):

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, *unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.*

The court then proceeded to illustrate its meaning, as follows (pp. 208–209):

> In the case of *The American Fur Company* v. *The United States*, 2 Pet. 358, decided in 1829, the goods of the company had been seized for violating the laws by their introduction into the Indian country under the act of 1802. This court held that if, by treaties made with the Indians after the passage of that act, their title to the region where the offence was committed had been extinguished, it had thereby ceased to be Indian country, and the statute did not apply to it.
>
> So in the case of *United States* v. *Forty-three Gallons of Whiskey*, decided at the last term, 93 U. S. 188, where this act of 1834 was fully considered; while the court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the Indians, it remained Indian country until they removed from it, the whole opinion goes upon the hypothesis that when the Indian title is extinguished it ceases to be Indian country, unless some such reservation takes it out of the rule. When this treaty was made, in 1864, the land ceded was within the territorial limits of the State of Minnesota. *The opinion holds that it was Indian country before the treaty, and did not cease to be so when the treaty was made*, by reason of the special clause to the contrary in the treaty, *though within the boundaries of a State.*
>
> It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians

> retain their original title to the soil, and ceases to be Indian country whenever they lose that title, *in the absence of any different provision by treaty or by act of Congress.*

In *Ex parte Crow Dog*, 109 U. S. 556, after quoting the rule announced in *Bates* v. *Clark*, the court said (pp. 561–562):

> In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, *but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of Congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it. United States* v. *McBratney*, 104 U. S. 621.

The cases cited establish two propositions, which seem controlling in the present case:

1. The potency of a treaty or an act of Congress to continue as Indian country lands to which the Indian title has been extinguished.

2. The immateriality of the fact that such lands are within an organized county of a State, as was the case

in *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188.

In the last mentioned case the court said (pp. 197–198):

> The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the "Indian country," that the ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew, that, if there was no cession, they were already sufficiently protected by the extent of their reservation.
>
> Under such circumstances, it was natural that they should be unwilling to sell, until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country, until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State

lines. Based as it is exclusively on the Federal authority over the *subject-matter*, there is no disturbance of the principle of State equality.

Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions. If this result can thus be obtained, surely the Federal government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce.

Minnesota, instead of being injured, is benefited. An immense tract of valuable country formerly withheld from her civil jurisdiction is subjected to it, and her wealth and power greatly increased. Traversed by railroads that were built, in part, at least, with lands which this treaty enabled Congress to grant, the country is open to sale and pre-emption and home-

> stead settlement, and will soon be occupied by a hardy and industrious people. The general government asks in return for this, that the ceded territory shall retain its original *status*, so far as the introduction within it of spirituous liquors and the sale of them to the Pembina Indians are concerned.
>
> It would seem, apart from the question of power, that the price paid by the State bears no proportion to the substantial and enduring benefits conferred upon her; and we are happy to say, that her officers are not engaged in making this defence.

But, it is said, the Nez Perces, having since received their allotments, are by virtue of the act of February 8, 1887, as interpreted by the court in the Heff case (197 U. S. 488), citizens of the United States and subject to the laws of the State of Idaho. Assuming, for the purposes of the argument, that this is so, how does that fact affect the jurisdiction expressly retained by Congress to regulate the introduction of intoxicants upon the ceded lands for a specified period? The stipulation in the Agreement to that effect was within the competency of Congress, under the decision in the case last cited, notwithstanding the lands were embraced within the limits and general jurisdiction of the State, and why should a subsequent change in the political status of one or all of the Indians impair the validity of the stipulation or relieve the United States from its obligation or power to enforce it? It is true that, under the decision in the Heff case, Congress has no jurisdiction to regulate commerce with the Indian tribes after

they have become citizens and been made subject to the laws of the State. But this Agreement, or regulation, was made before that occurred and while the Indians were still subject to the exclusive jurisdiction of Congress.

It is also to be borne in mind, as pointed out in *United States* v. *Forty-three Gallons of Whiskey*, supra, that the power of Congress to make treaties with the Indian tribes is co-extensive with its power to make treaties with foreign nations. As an illustration of the latter power the court referred to the subordination to treaty stipulations with a foreign nation of State laws regulating the right of aliens to take by descent or devise real property situate therein. The United States of course has no general jurisdiction to regulate the subject of inheritance in the States, but in pursuance of its authority to make treaties with foreign nations it could stipulate to do that which in effect amounted to such regulation, and make aliens competent to take by devise or descent. Applying that principle to the case in hand, the court held the jurisdiction of the State over the territory ceded was limited by the treaty stipulations with the Indians. The State was deemed to have accepted the grant upon the condition named, which condition was held not to be incompatible with the equal rights of the State with the other States of the Union.

Any change in the status of the Nez Perces is therefore unimportant. The General Government acquired the lands in question upon the express agreement that

they should be subject for a period of twenty-five years to the laws of the United States prohibiting the introduction of intoxicants in the Indian country. This agreement was made in pursuance of the constitutional authority of Congress to regulate commerce with the Indian tribes. It is the supreme law of the land, and must be recognized as such by both Federal and State courts.

The authority of Congress to retain jurisdiction and control over the lands of the Indians after they have become citizens and subject to the laws of the State is further illustrated by the case of *United States* v. *Rickert*, 188 U. S. 432, where it was held that the allotments made to them under the act of February 8, 1887, were not subject to State or municipal taxation. It is true it was said in that case that the allottees were still wards of the Government. But in the Heff case, where it was held otherwise, the Rickert case, in so far as it held that the lands of the allottees were not subject to taxation by the State, is cited with approval. (197 U. S., 508–509.)

There is here no divided jurisdiction, as the national laws entirely supersede State legislation on the subject.

In the act of July 3, 1890 (26 Stat., 215), admitting Idaho as a State, nothing was said as to the Indian lands or reservations. But the constitution formed by the people of Idaho at the time of the admission of the State provided (Article XXI, sec. 19)—

> And the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public

> lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and, until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

This was simply a recognition by the State of the absolute jurisdiction of Congress over the lands of the Indians until the Indian title was extinguished—not an agreement on the part of Congress that upon the extinguishment of the Indian title such absolute jurisdiction should revert to the State. It was for Congress to determine how the Indian title should be extinguished and the State can not complain if in order to do so it was necessary or desirable to stipulate for the retention of a limited jurisdiction over said lands for a specified period, since it is the ultimate beneficiary of such action.

**If the Agreement of May 1, 1893 is in conflict with the Act of February 8, 1887, the Agreement should prevail.**

The Agreement states that it is made in pursuance of the provisions of the act of February 8, 1887, and so far as possible, therefore, the provisions of that act should be given effect. But in case of conflict the general provisions of the act of 1887 must give way to the special provisions of the Agreement, which, having been ratified by Congress and approved by the President, has all the force and effect of a later statute.

This would unquestionably be so in the case of a conflict between different methods of allotment prescribed by the two statutes. Why should not the same rule be applied to the present situation?

Section 6 of the act of 1887 provides that Indians receiving allotments under the provisions thereof shall be citizens of the United States and entitled to the benefit of and subject to the laws, both civil and criminal, of the State or Territory in which they may reside. Article IX of the Agreement provides that the lands ceded by the Nez Perces, those retained and those allotted shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

There can be no question as to the authority of Congress to have provided, in terms, that the Nez Perces should not, by virtue of their allotments, become citizens of the United States and subject to the laws of the State. Hence, if it has provided for a retention of jurisdiction by the United States inconsistent with the citizenship of the Indian and his subjection to State jurisdiction, it has done impliedly and indirectly no more than it could have done expressly and directly. The special provisions in the Agree-

ment on this particular subject must, it would seem, override the general provisions in the act of 1887.

In *Ex parte Viles*, 139 Fed. Rep., 68, the District Court, W. D. Washington, held, as stated in the headnote:

> The provision of article 9 of the agreement made May 1, 1893, with the Nez Perce tribe of Indians, confirmed by act August 15, 1894, 28 Stat., 330, c. 290, that allottees of such tribe, whether under the care of an Indian agent or not, shall be subject for a period of 25 years "to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians," can apply only to Indians who received their allotments and acquired their rights of citizenship pursuant to such agreement, and can not affect the status of one who had previously acquired such rights and had become subject to State laws, so as to give force and validity as to him, to the unconstitutional act of January 30, 1897, 29 Stat., 506, c. 109, making it a crime to sell liquor to Indian allottees.

It will be seen that in this case the District Court was laboring under the erroneous impression that the Agreement of May 1, 1893, was made and ratified after the Nez Perces had received their original allotments. The court said that it did not appear from the record when the Indian to whom liquor had been sold in that case had received his allotment, and therefore indulged the presumption that he had received it prior to the Agreement. But, as set forth in the petition herein, the original allotments to the

Nez Perces were all made after the Agreement and were intended to be subject thereto. The provisions of Article IX refer to all the allotments, all the allottees, and all the lands.

In the report of the Commissioner of Indian Affairs for 1895, it is stated (p. 24):

> The checks for the first payment to the Nez Perces (except in cases where payment is suspended for letters of guardianship, etc.) have been transmitted to the agency for delivery to the Indians entitled thereto; also 1,575 patents to be delivered to allottees. This is in accordance with the agreement ratified by the act of August 15, 1894 (28 Stats., 286). It is expected that all preliminary requirements of the agreement will be complied with so as to permit the opening of the ceded lands by October 1, if the Department so desires.

I am advised that not only the representatives of the Government but the principal men of the Nez Perces desired the insertion of Article IX and the assurances for their protection which it contained. That theirs was no idle fear appears from the Reports of the Commissioner of Indian Affairs. Before the allotment and cession the Indian agents reported not more than one or two cases annually of the introduction of liquor in the reservation, while since that time, although the laws of the United States were supposed to be in force, it has been difficult to control the matter, and the recent decree of the Circuit Court of Appeals holding that the Federal jurisdiction is at

an end has inaugurated a general movement of the liquor people into the Nez Perce country.

Nothing was said in the Agreement upon the subject of citizenship and State jurisdiction. The Nez Perces were not apparently concerned with those questions. The Reports of the Commissioner of Indian Affairs show that they have little inclination to exercise the rights of citizenship with which the Supreme Court of the State has held them to be endowed. (*Wa-la-note-tke-tynin* v. *Carter*, 1898, 6 Idaho, 85, in which case, however, the Agreement of 1893 was not referred to.) But they were concerned—vitally concerned—with the liquor question. Can it be that the United States is unable to carry out its compact on this subject, and that the general provisions of the act of 1887, of which the Nez Perces were doubtless ignorant, nullify the express stipulations made to them in the Agreement?

It is to be remembered that we have not here, as in the matter of Heff, a case where Congress had parted with its jurisdiction over the Indians and then afterwards attempted to reassert it, but a case where Congress was in possession of absolute jurisdiction over the Indians and their lands and could do with them as it saw fit. If there be a conflict between the provisions of the act of February 8, 1887, and Article IX of the Agreement of 1893, the question then is simply one of intention. Applying well-settled principles, the later and more specific provision should prevail.

**The stipulations in the Agreement are separable—that as to the lands may stand, though that as to the allottees should fall.**

If the court should be of the opinion that Congress intended the Nez Perces should, upon receiving their allotments, be citizens of the United States and subject to the laws of the State, and that the stipulation in Article IX of the Agreement that they shall be subject for twenty-five years to all the laws of the United States prohibiting the sale of intoxicants to Indians has become void because of their change of status, nevertheless the stipulation in that Article as to the lands of the Nez Perces may stand, because it is entirely separable and independent, and, under the decision in *United States* v. *Forty-three Gallons of Whiskey*, *supra*, as heretofore pointed out, is within the constitutional power of Congress.

It is respectfully submitted that a writ of *certiorari* should issue as prayed.

HENRY M. HOYT,
*Solicitor General.*

O